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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2009 MAR 24 PM 4:40
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	No. CR 2008-1339 Division 6 **MOTION FOR NEW FINDING OF PROBABLE CAUSE** (Oral Argument Requested)

Pursuant to Rule 12.9(a) of the Arizona Rules of Criminal Procedure, Defendant Steven DeMocker requests that this Court remand this matter to the grand jury for a new finding of probable cause. This Motion is supported by the following Memorandum and Points of Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 12.9 of the Arizona Rules of Criminal Procedure provides that a grand jury proceeding may be successfully challenged if the defendant was denied a "substantial procedural right." Ariz. R. Crim. P. 12.9. Substantive due process in grand jury

proceedings "requires the use of an unbiased grand jury and a fair and impartial presentation of the evidence." *See Crimmins v. Superior Court*, 137 Ariz. 39, 41, 668 P.2d 882, 884 (1983) (en banc) (inaccurate testimony contributed to denial of defendant's substantial procedural rights).

A "primary security to the innocent against hasty, malicious and oppressive persecution," the grand jury "serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by intimidating power or by malice and personal ill will." *Wood v. Georgia*, 370 U.S. 375, 390 (1962). To "do its job effectively, the grand jury must receive a fair and impartial presentation of the evidence." *Maretick v. Jarrett*, 204 Ariz. 194, 197, 62 P.3d 120, 123 (2003) (defendant denied due process right to a fair and impartial grand jury proceeding).

Particularly significant in this process is the role of the prosecutor. "The prosecutor acts not simply as an advocate, but as a 'minister of justice,' who assists the jurors in their inquiry." *Maretick*, 204 Ariz. at 197, 62 P.3d at 123, *quoting* Ariz. R. Sup. Ct. 42, ER 3.8 cmt. Indeed, the prosecutor's office bears a "particularly weighty duty not to influence the jury because the defendant has no representative to watch out for his interests" before the grand jury. *State v. Hocker*, 113 Ariz. 450, 454, 556 P.2d 784, 788 (1976) *disapproved on other grounds by State v. Jarzab*, 123 Ariz. 308, 599 P.2d 761 (1979).

This Court found that the State's first grand jury presentation failed to comply with Rule 12.9 and held that Mr. DeMocker was "deprived of a substantial procedural right in the lack of a fair and impartial presentation to the grand jury through a combination of factors." (January 22, 2009 Ruling on Motion for New Finding of Probable Cause Order (hereinafter "Remand Order") at page 2). The State has again denied Mr. DeMocker substantial procedural rights by: 1) refusing to present clearly exculpatory evidence to the grand jury; 2) returning an indictment against him using

false, misleading, irrelevant and prejudicial testimony; and 3) denying his right to have the State present evidence to the grand jury in a fair and impartial manner. *Crimmins,* 137 Ariz. at 41, 668 P.2d at 884.

I. THE STATE'S FAILURE TO PRESENT CLEARLY EXCULPATORY EVIDENCE REQUIRES REMAND FOR A NEW FINDING OF PROBABLE CAUSE.

The State is required to present clearly exculpatory evidence to the grand jury. *Trebus v. Davis*, 189 Ariz. 621, 624, 944 P.2d 1235, 1238 (1997). Clearly exculpatory evidence need only be "of such a weight that it *might* deter the grand jury from finding the existence of probable cause." *Id.* at 625 and 1239 (emphasis added). The State is also required to present the grand jury with the relevant, accurate substantive facts. *See Herrell v. Sargeant*, 189 Ariz. 627, 944 P.2d 1241 (1997) (remand affirmed where County Attorney failed to present Defendant's version of the relevant, substantive facts).

The Court's Remand Order identified several items of evidence as clearly exculpatory. (Remand Order at page 2-3.) The clearly exculpatory evidence identified by the Court includes, in part, the following: unknown male DNA on a cordless phone found next to the victim – the phone the victim was believed to be speaking on when her call was interrupted; unknown male DNA under the fingernails of Ms. Carol Kennedy's left hand; unknown male DNA from unscrewed light bulbs in the laundry room of the victim's home; and unknown male DNA on a door handle at the victim's home. The Remand Order noted that identifying the presence of unknown male DNA as "inconclusive" is not an accurate presentation of the clearly exculpatory evidence. (*Id.*) Other clearly exculpatory evidence includes unidentified fingerprints on the victim's papers near her body, the absence of any finding of Mr. DeMocker's DNA or blood at the crime scene, and the presence of shoe tracks at the crime scene that do not

match any of Mr. DeMocker's shoes. The State's second presentation to the grand jury ignored much of the Court's Remand Order regarding their duty to present clearly exculpatory evidence, failed to present clearly exculpatory evidence, and obfuscated the presentation of the evidence in confusing, convoluted explanations with significant, material omissions – concluding with the extraordinary assertion, clearly contrary to the Remand Order, that Mr. DeMocker's DNA may in fact be at the victim's home "because of the 'inconclusive' results." (GJ 62:19-22). Remand is once again required.

1. <u>The State's Failure to Present Evidence of Unknown Male DNA on the Cordless Phone Requires Remand.</u>

The State failed to clearly advise the second grand jury of the presence of unknown male DNA on the cordless phone.[1] Instead of advising the grand jury of this exculpatory evidence, it provided a lengthy, nonsensical, hyper-technical description of largely irrelevant testing of the phone by the Department of Public Safety and Sorenson Labs. This testimony goes on for four pages, is extremely confusing, and never provides the simple declarative statement that male DNA -- that was not Steve DeMocker's -- was found on the phone. (GJ 55:13-59:8). In fact, Detective Doug Brown testified several times that male DNA was **not** found on the phone. Brown testified that Sorenson Labs, "[d]id not identify the presence of the male chromosome" (GJ 57:14-15). He also testified that "DPS original testing of the items did not detect the male chromosome. When sent to Sorenson, it did not detect male chromosomes." (GJ 58:5-7). Detective Brown further testified that the results from the phone were "inconclusive." "On September 11th it said human male DNA isolated for No. 507A. Inconclusive or no results were obtained from that item." (GJ 57:9-11). After repeating that neither lab found male DNA on the item, Detective Brown concluded "[w]hen sent

[1] The Remand Order indicated that the State mislead or omitted evidence from the first grand jury regarding unknown male DNA on the cordless phone found next to the victim at the time of the attack. The Court found that "[t]he testimony was misleading in that the jury was not told there was a component from an unknown male." (Remand Order at page 3).

for the Y-STR, it did, but it gave inconclusive results." Despite the Court's explicit finding that evidence of unknown male DNA on the phone is clearly exculpatory, the State continued to mislead the grand jury and omitted this clearly exculpatory evidence. This was both a violation of Mr. DeMocker's right to have clearly exculpatory evidence presented to the grand jury, (*see Trebus*, 189 Ariz. at 624, 944 P.2d at 1238 and *Herrell v. Sargeant*, 189 Ariz. 627, 944 P.2d 1241) and his right to a fair and impartial presentation of the evidence to the grand jury. *Maretick,* 204 Ariz. at 197, 62 P.3d at 123. Remand is therefore required.

2. <u>The State's Failure to Present Evidence of Unknown Male DNA on the Laundry Room Light Bulbs Requires Remand</u>.

The State also failed to tell the grand jury about clearly exculpatory evidence in the form of DNA from an unknown male found on the laundry room light bulbs.[2] Even more egregiously, the State also falsely implied that the DNA might be Mr. DeMocker's. Detective Brown continued to give extremely confusing and misleading testimony about the forensic evidence. Regarding the DNA testing on the three laundry room light bulbs, he told the grand jury the following: there was "cellular material" on all three light bulbs (GJ 61:9-11); two light bulbs had human DNA (GJ 61:13-14); there was no DNA on one light bulb and "inconclusive" or no results on two light bulbs (GJ 61:15-17); one light bulb contained a mixture of three profiles (GJ 61:18-23); and one light bulb contained a mixture of four profiles (GJ 61:24-62:1). In the midst of this confusing and unnecessary testimony, Detective Brown told the grand jury that two bulbs had male DNA on them but failed to tell them that it was DNA from an unknown male who is not Steve DeMocker. (GJ 61:21 and 25). Furthermore, after he failed to properly identify the DNA as being from an unknown male, Detective Brown suggested

[2] The Remand Order's found that unknown male DNA on light bulbs in the laundry room was clearly exculpatory and that telling the grand jury that the testing on the light bulbs was "inconclusive" was insufficient. (Remand Order at page 3).

that the DNA may indeed be Mr. DeMocker's. He testified that "[w]e got other reports on it, but for the most part what those are saying are, with those results, it detected Y chromosome on those, but because of the number of contributors, they are not able to make exclusions from that for the most part." (GJ62:10-14). A few lines later, Mr. Mark Ainley asked Detective Brown, "Mr. DeMocker's DNA and fingerprints were not found at Ms. Kennedy's house" and Detective Brown responded exactly as the Court found to be inappropriate with the last grand jury, "I can't say that for sure because of the inconclusive results." (GJ62:19-22). This error was compounded even further by later testimony from Detective John McDormett in response to a question about other suspects, "DNA was collected from boyfriends ... anybody that had been to the house, and we had that DNA subsequently tested. *At this point, the only viable suspect is Mr. DeMocker*." (GJ89:12-15) (emphasis added). This testimony was incredibly misleading since none of the DNA testing indicates that Mr. DeMocker is a viable suspect. In fact, the evidence indicates the presence of some other unknown suspect or suspects and this vital information was not shared with the grand jury. This was both a violation of Mr. DeMocker's right to have clearly exculpatory evidence presented to the grand jury, (*see Trebus*, 189 Ariz. at 624, 944 P.2d at 1238 and *Herrell v. Sargeant*, 189 Ariz. 627, 944 P.2d 1241) and his right to a fair and impartial presentation of the evidence to the grand jury. *Maretick,* 204 Ariz. at 197, 62 P.3d at 123. If Mr. Ainley was surprised (as he should have been) by these answers, he had a duty to immediately correct these false and misleading statements. If Mr. Ainley was indeed seeking these answers, he was soliciting false and misleading testimony. Remand is once again required.

3. **The State's Failure to Present Evidence of Unknown Male DNA on the Door Handle Requires Remand.**

The State also did not tell the grand jury that unknown male DNA was on the inside of a door handle at the victim's residence – again ignoring both the Remand Order and Mr. DeMocker's rights.[3] Detective Brown testified that "[a]s far as No. 805, which is the door handle, I can go in there, and again they're able to make exclusions when applicable. Reference the blood and swabs from that door handle, on the August 1st report from DPS, human DNA was isolated. DNA profile is a mixture of two individuals. Major component mixture matches DNA profile of Virginia Kennedy at all 14 loci. Results from the minor component are inconclusive... and for that one, Steven DeMocker was excluded as a contributor for that date." (GJ62:24-63:10). This is exactly the same testimony the Court found in the first Remand Order denied Mr. DeMocker substantive due process required under Rule 12.9. Detective Brown again failed to fully advise the grand jury of the existence of clearly exculpatory evidence. This too requires remand.

4. <u>The State's Failure to Present Evidence of an Unidentified Fingerprint at the Crime Scene Requires Remand.</u>

In addition to the unknown male DNA on the victim's cordless phone, light bulbs and door handle, the State knew that an unknown person's fingerprint was found on a stack of papers found at the scene containing the victim's handwriting. (Evidence Item 852, Bates Nos. 3044 and 3047). Neither the first nor second grand jury was told about this fingerprint. Mr. DeMocker has been excluded from this item and this evidence was available to the State since at least July 25, 2008, before either grand jury presentation. (*Id.*) This evidence, in combination with what is outlined above, is clearly exculpatory and the State has a duty to inform the grand jury of its existence. The State's failure to

[3] The Remand Order found that the State's testimony to the first grand jury regarding blood evidence on the door handle was incomplete. The first grand jury was told that the minor was "inconclusive" and that Steven was excluded. That grand jury was not told that "results of testing showed an unknown male as providing the minor component.", nor was this grand jury. (Remand Order at page 3).

do so violated Mr. DeMocker's rights and requires remand. *See Trebus*, 189 Ariz. at 624, 944 P.2d at 1238 and *Herrell v. Sargeant*, 189 Ariz. 627, 944 P.2d 1241.

5. <u>The State's Suggestion that Mr. DeMocker's DNA and Fingerprints May Have Been Found At the Scene and Repeated References to "Inconclusive" Results Require Remand.</u>

Detective Brown suggested to the grand jury that Mr. DeMocker's DNA and fingerprints were found at the victim's house. (GJ 62:19-22). Mr. Ainley asked Detective Brown if it was true that "Mr. DeMocker's DNA and fingerprints were not found at Ms. Kennedy's house", to which Detective Brown responded "I can't say that for sure because of the inconclusive results." (*Id.*) (emphasis added) His assertion was not corrected by the prosecutor. Detective Brown also testified that DNA samples from the door handle, light bulbs and phone all produced "inconclusive results." (GJ 71:23). He did not, as directed by the Remand Order and as required by the law, tell the grand jury that these items of evidence contained unknown male DNA. This critical failure requires remand.

The State also failed to advise the grand jury, as expressly requested in Mr. DeMocker's January 29, 2009 *Trebus* letter to Mr. Ainley, that over fifty items of evidence were seized and tested without finding any connection between Mr. DeMocker and the victim. This request was consistent with the Court's finding in the *Simpson* Order that "[n]o blood, DNA, or other physical evidence was found ... that would tie the Defendant to the victim or her residence ..." and "[n]o physical evidence in the form of DNA samples or fingerprints of the Defendant was found at the scene of the crime." (January 22, 2009 Order re: State's Request to Hold Defendant in Custody Without Bond, (hereinafter *Simpson* Order) at pages 4-5). The State told the grand jury that it seized Mr. DeMocker's shoes, his bicycle, swabbings in his car, "and all that." (GJ 53:1-3). What the State did not do was advise the grand jury of the clearly exculpatory results. In this case, none of the blood, DNA or fingerprint evidence described to the

grand jury links Mr. DeMocker to this crime. In fact, the presence of someone else's DNA at the scene, particularly under the victim's fingernails, strongly suggests someone other than Mr. DeMocker was the killer.

The significance of misleading, incomplete testimony regarding forensic evidence was highlighted in a groundbreaking report released earlier this year by the National Academy of Sciences. The National Academy was directed by Congress to undertake the study that led to the report. Scholars from the legal and scientific communities heard evidence from federal agency officials, academics, federal, state and local law enforcement officials, medical examiners, a coroner, crime laboratory officials, independent investigators and defense attorneys, forensic science practitioners and leaders of professional organizations. After over two and half years of study and research, the National Academy recently released an exhaustive and fully documented report entitled "Strengthening Forensic Science in the United States: A Path Forward." http://www.nap.edu/catalog/12589.html. The Report detailed serious flaws in the scientific reliability and reporting of forensic testing and suggested sweeping reform.[4] It found that "... if the scientific evidence carries a false sense of significance ... the jury or court can be misled, and this could lead to wrongful conviction or exoneration. If juries lose confidence in the reliability of forensic testimony, valid evidence might be discounted, and some innocent persons might be convicted or guilty individuals acquitted." *See* "Strengthening Forensic Sciences in the United States," at 1-2. The Report contains a series of recommendations including standardized terminology and reporting for forensic science investigations. Significantly, the Report found that use of language describing conclusions and degrees of association in forensic testing "can and does have a profound effect on how the trier of fact in a criminal or civil matter

[4] See Attached as Exhibit A, "Science Found Wanting in Nation's Crime Labs" NY Times, February 4, 2009 http://www.nytimes.com/2009/02/05/us/05forensics.html?_r=1&pagewanted=print; "Report questions science, reliability of crime lab evidence" LA Times, February 19, 2009, http://www.latimes.com/news/local/la-na-crime-science19-2009feb19,0,1813276.story.

perceives and evaluates scientific evidence." *Id.* at S-15. Counsel specifically addressed this issue in its *Trebus* letter to Mr. Ainley on January 29, 2009, requesting of the State that "[i]n describing DNA test results the grand jury must be told that a profile either matched Mr. DeMocker or it did not. If results are inconclusive (as with # 507, 800 and 801), the State must not imply that the sample might have or could have come from Mr. DeMocker." This request was ignored and the resulting confusion and exclusion of clearly exculpatory information requires remand.

6. <u>Omitted Testimony Regarding Exculpatory Shoe Print Evidence Requires Remand</u>.

In addition to the exculpatory forensic information kept from the grand jury described above, the State failed to tell the grand jury that the shoe tread patterns it located at the scene did not match any shoes recovered from Mr. DeMocker. Brown told the grand jury that Mr. DeMocker's shoes were seized "to check to see if they matched the tread patterns ... ." (GJ 53:1-2). Brown further testified that shoe tracks were located at the scene "where it appeared the bicycle was left in the bushes" and that the tracks made a "wide arcing route to the backyard of Carol Kennedy's house" and then similar shoe tracks back to the bike from the house. (GJ44:4-11). The State did not tell the grand jury that none of Mr. DeMocker's shoes matched the tread pattern found behind the victim's house. Furthermore, the detectives failed to advise the grand jury that they seized Mr. DeMocker's clip-less bike shoes which specifically fit the kind of pedals on the bike he was riding and which leave a very distinctive track that was not found anywhere near the scene. Here again, the State deprived Mr. DeMocker of his right to due process through its failure to present this exculpatory evidence. *See Trebus*, 189 Ariz. at 624, 944 P.2d at 1238 and *Herrell v. Sargeant*, 189 Ariz. 627, 944 P.2d 1241; *Maretick,* 204 Ariz. at 197, 62 P.3d at 123.

7. **Remand Is Required Because the State Failed to Introduce Other Clearly Exculpatory Evidence.**

A week prior to the subject grand jury presentation, defense counsel sent a detailed *Trebus* letter to Mr. Ainley. Because the State's interest must not be just in getting an indictment but in serving the interests of justice, the Arizona Supreme Court has stated that "[w]e therefore see nothing odd in requiring the prosecutor to tell the grand jury about possible exculpatory evidence." 189 Ariz. at 624, 944 P.2d at 1238. The State failed to present the following exculpatory evidence outlined in the *Trebus* letter:

- The letter requested that "[t]he officers testifying should be cautioned about speculating, without any evidence to support it, that Mr. DeMocker was wearing gloves and overalls or that he burned those items to get rid of them." During testimony about an evidence technician at the scene who Detective Brown said "didn't get any fingerprints from the residence from all the areas that she attempted to collect" Mr. Ainley asked Detective Brown if the lab could "detect if somebody wore a glove" and he answered no. (GJ 76:2-14), which created a false inference based solely on speculation that Mr. DeMocker was wearing gloves.
- The letter requested that the grand jury be told that there are no prior reports of domestic violence between the victim and Mr. DeMocker. The State did not so advise the grand jury.
- The letter requested that the grand jury be told that it didn't get dark until about 9 pm on July 2. Mr. Ainley asked Detective Brown "if "sunset that July 2nd [was] at approximately 7:46?" Detective Brown replied, "[t]hat's what it states in one of the almanacs." (GJ 72:9-12). That question and answer misled the jury because "sunset" does not mean "dark."

- The letter requested that the grand jury be told that the most recent rainfall in that area was just four-hundredths of an inch and that it fell between 5 and 6:30 p.m. the afternoon prior, as measured at a weather station less than a mile from the victim's home. Instead, Detective Brown testified that "we were advised by some neighbors it had rained recently earlier that day around the neighborhood. (GJ 43:8-10).[5]
- The letter requested that the grand jury be told that none of the materials produced in the Google searches from Mr. DeMocker's computer describe the way Ms. Kennedy died. Instead, in offering Exhibit 5, the State tried to suggest a similarity between the search results and Ms. Kennedy's death. However Exhibit 5, and most of the other searches cited by the State, are about staging murders as suicides. None of them involve staging a murder to appear to be an accident, as the State suggests happened in this case.
- The letter requested that the grand jury be advised that Mr. DeMocker told detectives that he had been biking on trails west of Williamson Valley Road near Granite Mountain, starting at least one and a half miles from the Kennedy home and traveling away from that scene at the time of the crime, and that the State should not elicit the misleading testimony included in its original presentation characterizing the trail as "across the street" from the victim's neighborhood. Instead, Detective Brown again told the grand jury that "[t]he place where he parked is right across. You would hang a left and drive up a little ways" (GJ 38:21-25, 39:1). Even though he told the grand jury, as requested, that Mr. DeMocker actually

[5] The State knows, or should know, that there is a U.S. Weather Service certified monitoring station (KAZPRESC10) at 7770 N. Box Wood Drive, within a few blocks of the gate at the end of Glenshandra Drive. The weather station is operated by Embry Riddle Meteorology professor Curtis Neal James.

advised detectives that he then rode west and south away from the Bridle Path home, the grand jury could easily have inferred from this misleading and incomplete answer that Mr. DeMocker was very near the scene.

- The letter requested that if the State intended to offer testimony about the replacement of Mr. DeMocker's driver's license and passport, purchase of a motorcycle, his daughter's diary entry regarding him talking about running, various books and statements as evidence of consciousness of guilt, they must also fairly and impartially note that those items had been seized by police and needed to be replaced; that Mr. DeMocker was not under arrest nor told to restrict his travel during this time and that while he was replacing items, including his shoes and underwear, he was fearful of wrongful arrest. The State did not fairly advise the grand jury of this information. In fact, when specifically asked by grand jurors if Mr. DeMocker was told not to travel or not to replace his passport, Detective McDormett responded only "I don't believe so.", leaving open for the grand jury to speculate on the possibility that he may have been so restricted, when he knew without question that was not true. (GJ 111:5-112:1).

II. THE STATE'S SOLICITATION OF FALSE AND MISLEADING TESTIMONY REQUIRES A REMAND FOR A NEW FINDING OF PROBABLE CAUSE.

Substantive due process requires a fair and impartial presentation of the evidence. *See Crimmins v. Super. Ct.*, 137 Ariz. at 41, 668 P.2d at 884. In *Nelson v. Roylston*, 137 Ariz. 272, 669 P.2d 1349 (Ct. App. 1983), the Arizona Court of Appeals reviewed the propriety of a grand jury proceeding during which a witness provided misleading testimony. Noting that the prosecutor knew of the misleading character of

the testimony, the court recognized that there is "a duty of good faith on the part of the prosecutor with respect to the court, the grand jury, and the defendant." *Id.*, 137 Ariz. at 276, 660 P.2d at 1353. Incumbent in that duty is the obligation to correct false testimony, even where the State has not solicited such testimony. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959). A prosecutor's failure to do so, the Arizona appeals court held, necessarily results in a denial of due process and requires a remand for a new determination of probable cause. *Nelson*, 137 Ariz. at 277, 660 P.2d at 1354; *see also Maretick,* 204 Ariz. at 198, 62 P.3d 124.

1. **Misleading and Incomplete Testimony Regarding Bicycle Tire Track Comparison Requires Remand.**

The State provided the grand jury with misleading and incomplete testimony regarding the bicycle tire track evidence.[6] Detective Brown testified that Sergeant Daniel Winslow rolled Mr. DeMocker's bike tracks in the same type of sand and "he was able to identify those tracks, appeared to be similar." (GJ45:6- 8). Detective Brown continued by telling the grand jury that the front tracks "appeared identical" and when pressure was placed on the rear tire "to flatten out the airless tire," "it again appeared identical." (GJ 45:15-19). Further, Detective Brown testified that his sergeant's report read that "[t]here was *no* doubt these sets of tracks were made by the same tires." (GJ45:13-22). The report actually says there was "*little* doubt," not "no doubt" about the comparison. (Bates No. 26). Detective Brown's testimony gave greater weight to his sergeant's lay opinion than to the experts at DPS who concluded only that there were "similar" tire tread patterns and cautioned that nothing further could be determined from the evidence.

[6] The Remand Order noted that the "better practice" would be for a grand jury witness to use the same language as the prospective expert witness when describing results. (Remand Order at page 4).

Detective Brown also omitted DPS's expert conclusion that it could not verify if the rear tracks were made by a deflated tire. (Bates No. 001943). The grand jurors were interested in whether the bike tires were sold as a pair. (GJ46:2-5). Another grand juror specifically asked if the back tire was flat when tested. (GJ75:6-13). Detective Brown said that the tire was flat, but again did not tell the grand jury that the DPS lab concluded that it could not verify the rear tracks were made by a deflated tire. The State elicited Detective Brown's incorrect recounting of a lay opinion that the tire impressions were made by a flat tire and ignored the expert report to the contrary it had received. The State's conduct violated the "duty of good faith on the part of the prosecutor with respect to the court, the grand jury, and the defendant," (*Nelson*, 137 Ariz. at 276, 660 P.2d at 1353), and the Court's strong suggestion that the "better practice" is to avoid opinion and speculation with the grand jury and to rely instead on the prospective expert witness's language. (Remand Order at page 4.) A remand for a new determination of probable cause is therefore required. *Id.* at 277, 660 P.2d at 1354; *see also Maretick*, 204 Ariz. at 198, 62 P.3d at 124.

2. <u>Misleading Evidence Regarding the Cause of Victim's Injuries and Irrelevant Evidence Regarding a Golf Club Head Cover Requires Remand</u>.

The State misled the grand jury about the golf club head cover, the head cover's connection to a possible weapon and the state of the evidence about the golf club as a possible weapon. Detective McDormett testified that Dr. Laura Fulginiti said that "...a golf club would be consistent." (GJ 102:7-13). This conversation was apparently not reported by either Detective McDormett or Dr. Fulginiti. Detective McDormett did not tell the grand jury that Dr. Fulginiti's written report actually concluded only that the golf club "cannot be ruled out as the cause of the defects." (Bates No. 000549). This was another example of the State failing to follow the "better practice" of using the language of the prospective expert witness. (Remand Order at page 4). Detective

McDormett also failed to tell the grand jury that Dr. Fulginiti said that in determining if the particular golf club was the weapon, other golf clubs and objects should be tested to show the differences in impact damage. (Bates No. 001939), nor were they told that other implements were not tested.

Instead, the State interspersed a discussion of the golf club as the murder weapon with a discussion of a golf club head cover photographed on a shelf in Mr. DeMocker's home. After asking about the victim's skull being "in approximately 50 pieces" (GJ 65:10) Mr. Ainley immediately moved to a discussion of the first search warrant and photographs of the head cover. (GJ 65:14-66:15). After introducing Exhibit 1, a photograph of the head cover (GJ 66:14), Mr. Ainley resumed discussion of the autopsy and golf club as murder weapon. (GJ 66:16-67). This testimony was coupled with inappropriate speculation, specifically elicited by Mr. Ainley, along with the use of prejudicial photographs. Upon showing the grand jury a photo of the victim with a golf club shaft lain against her right arm, Mr. Ainley asked Detective Brown "[t]his indentation that you see on her arm right here, if you take this club and rotate it up, does it fit into this indentation?" Detective Brown speculated as he was asked to do by Mr. Ainley, "[i]t appears to fit with the markings." (GJ 68:12-15). This testimony is unfounded prejudicial speculation without a basis in fact. Detective Brown also falsely told the grand jury that Detectives prepared a second search warrant for the missing golf club head cover. (GJ 68:18-22). Detective Brown and Mr. Ainley both knew that this search warrant sought only shoes, golf clubs and items resembling a golf club. (Bates Nos. 1656-1657). This testimony was false and misleading and the State failed to correct it.

Detective Brown also improperly suggested to the grand jury that the murder weapon was taken to the victim's home by Mr. DeMocker. This is entirely speculative and incredibly prejudicial. The State does not know what the murder weapon was. The State only believes that the victim's injuries were consistent with a golf club it has never

recovered. The State has not tested other implements as suggested by its own expert to determine other possible murder weapons, including other golf clubs beyond the one they have focused on from the first day of this investigation. Instead of acknowledging these limitations, in response to a question about where the golf club "used on [the victim]" came from, Detective Brown responded that "Mr. DeMocker had a golf club to take her to sell in an upcoming garage sale." (GJ 79:14). He also testified that Renee Girard stated that Mr. DeMocker had taken over a golf club a week prior to the murder. (GJ 79: 16-23).

As a result of this speculative and prejudicial testimony, Mr. DeMocker was denied his right to have the State present evidence to the grand jury in a fair and impartial manner. Substantive due process in grand jury proceedings "requires the use of an unbiased grand jury and a fair and impartial presentation of the evidence." *See Crimmins*, 137 Ariz. at 41, 668 P.2d at 884. Remand is therefore required.

3. The State's Misleading, Speculative Information About Mr. DeMocker's Alleged Financial Fraud Requires Remand.

As the Remand Order noted, when the State offers opinions rather than testimony regarding the facts, it colors the grand jury presentation. (Remand Order at page 4). The Remand Order gave specific examples of improper opinion testimony including speculation about Mr. DeMocker hiding assets in his divorce and engaging in tax cheating. (*Id.*) Furthermore, the Court's *Simpson* Order found that it was shown no evidence "that there was fraud or perjury in the financial affidavit or in obtaining the disposition in the divorce or on tax returns." *Simpson* Order at page 2-3. The Order also noted that "the State has not shown evidence that ... Steven DeMocker was aware of any intent by Carol Kennedy to report him to the IRS." (*Id*). The State's rampant and misleading speculation to the grand jury about Mr. DeMocker's alleged financial fraud was in direct contradiction with the Court's findings and with the requirements of substantive due process. *See Crimmins*, 137 Ariz. at 41, 668 P.2d at 884.

Mr. Richard Echols, a CPA who is also police officer, testified that he reviewed the report of Mr. Casalena , a CPA employed by Ms Kennedy in the divorce proceedings , as well as documents that were given to Mr. Fruge, the victim's divorce attorney, and other subpoenaed documents. (GJ 138:12-19). While acknowledging that he did not have the all information he needed to render a complete analysis, even with the subpoena power of the State behind him, Mr. Echols repeated the unsupported conclusions of Mr. Casalena (who also asserted a need for additional information to support his conclusions), that Mr. DeMocker was hiding assets in his divorce. (GJ 143:6-9). Echols further testified that "... the figures [Mr. DeMocker] was using were inaccurate, and in fact, some of the figures that he had submitted to the court were in fact fraudulent ... ." (GJ 147:8-11). There is no evidence whatsoever to support these accusations, and both Mr. Echols and Mr. Ainley are familiar with the actual evidence and the Court's *Simpson* findings inconsistent with Mr. Echols' grand jury testimony. (*Simpson* Order at page 2-3). This was a violation of Mr. DeMocker's right to a fair and impartial presentation of the evidence and a violation of the State's obligation to correct false testimony.

Mr. Echols also testified that Ms. Kennedy gave Mr. DeMocker a note on March 1, 2008 saying that she was going to refer him to the IRS. (GJ 144:6-9). Again, both Mr. Ainley and Mr. Echols know this is not supported by the evidence and they are both aware of the Court's *Simpson* findings that this is not true. (*Simpson* Order at page 2-3). This document, if it exists, was not offered as an exhibit to the grand jury and has not been provided to defense counsel. The only document defense counsel can identify as possibly being incorrectly referred to by Mr. Echols is a page of handwritten notes turned over to the State by Cynthia Wallace titled "Schedule of 2007 Support Payments to Carol Under Temporary Orders." (Bates No. 000710). This document indicates that Ms. Kennedy believed that Mr. DeMocker's accountant violated the standards of his profession and that Ms. Kennedy was going to report the accountant to the State Licensing Board. There is no

indication in this document that Ms. Kennedy was planning to refer Mr. DeMocker to the IRS nor is there any indication that Mr. DeMocker or his accountant were ever provided a copy of this document. In further providing misleading and inaccurate information to the grand jury, Mr. Echols speculated, when asked to do so by Mr. Ainley, that the IRS was "not going to be happy. I think that's an understatement, but they were not going to be happy" if they looked at Mr. DeMocker's financial practices. (GJ 146:21-25.) All of this testimony was entirely speculative, untruthful and extremely prejudicial and requires remand under Rule 12.9. *See Crimmins*, 137 Ariz. at 41, 668 P.2d at 884.[7]

The *Trebus* letter requested that if the State intended to claim that Mr. DeMocker had a financial motive, the grand jury be provided with the following exculpatory information, all of which the State failed to disclose to the grand jury:

- That during that time Mr. DeMocker had been voluntarily providing Ms. Kennedy and their two children all of their personal living expenses and paid all of the marital debts, in an amount of at least $15,000 per month.
- That divorce proceedings were initiated in mid-2007 and that each of them was represented by an attorney of his/her choosing.
- That there was an agreement for temporary support after the divorce was filed in which Mr. DeMocker agreed to continue to pay all of the expenses of Ms. Kennedy and their children.
- That the divorce settlement was agreed upon by the parties, not imposed by a court order after a trial.
- That the financial terms of the settlement substantially favored Mr. DeMocker compared to what he had been paying for many years, and gave him a significant tax benefit.
- That the execution of the divorce settlement resolved Ms. Kennedy's prior claims in the divorce regarding allegations of fraud, concealment of assets and false statements by Mr. DeMocker.

[7] Mr. Echols also testified that Mr. DeMocker was better off financially with the victim dead. (GJ 144:18-145:8). Counsel specifically cautioned the State against giving false and speculative testimony to this effect in the *Trebus* letter. Again, this request was ignored.

- That there is no evidence Ms. Kennedy ever told Mr. DeMocker she was going to file a complaint against him with the IRS or anyone else alleging fraud or other financial misconduct.

- CPAs, including the last one consulted by Ms. Kennedy, disagreed with her assessment that Mr. DeMocker's tax deductions were improper. (*Simpson* testimony of Anna Young and Cynthia Wallace).

The State also failed to elicit correct testimony about the dates of life insurance policies on Ms. Kennedy. Mr. Ainley elicited testimony that there were two life insurance policies on Ms. Kennedy and that Mr. DeMocker was the beneficiary on those policies. (GJ 47:9-23). When a grand juror asked about when the life insurance policies were taken out on Ms. Kennedy, Mr. Echols responded that he did not know. (GJ 151:5-7). Mr. Ainley knew that those policies were taken out several years before but failed to correct Mr. Echols testimony and instead left the jury to speculate that the policies had been taken out just before Ms. Kennedy's death. This violated Mr. Ainely's duty to correct misleading testimony.

Lastly, Mr. Echols also misrepresented Anna Young's testimony and implied that Mr. DeMocker and Ms Young had not provided information requested by the State.[8] When Mr. Echols was asked if Mr. Casalena's information was consistent with Ms Young's testimony that the information the victim had requested was provided, Mr. Echols responded "[n]o. In fact, the information that I've been asked to review is still short the information that Mr. Casalena was asking for, *and that I have been asking for*." (GJ 141:8-11) (emphasis added). Later, Mr. Echols testified that Mr. Casalena had asked for "a number of accounts" "*and I have asked for* that would identify some of the sources of that revenue and disclosure of where that revenue went *that we have still not obtained*." (GJ 141:22-142:1) (emphasis added). This testimony unfairly and

[8] The *Trebus* letter also requested that Anna Young be permitted to testify before the grand jury. Again, the State denied this request and, instead, impugned her credibility through this witness' inaccurate testimony.

prejudicially implied that Mr. DeMocker's attorney lied in her *Simpson* testimony and that either or both of them were somehow preventing Ms Kennedy and the State from obtaining this information. The grand jury should have been told that neither Ms. Kennedy nor her attorney waited for any additional information before agreeing to a divorce settlement because Mr. DeMocker and his attorney had provided all documents with detailed explanations pursuant to any and all requests from Ms Kennedy and her lawyer. The State, after her death, never asked Ms Young, Mr. DeMocker or his accountant for any document or record prior to the second grand jury presentation.

Misleading, incomplete and inaccurate information about Mr. DeMocker's non-existent financial fraud fabricated a motive for Mr. DeMocker and violated Mr. DeMocker's substantial due process rights as did the State's failure to provide the grand jury with relevant exculpatory information. A remand for a new determination of probable cause is therefore required. *Maretick*, 204 Ariz. at 198, 62 P.3d at 124.

4. <u>False Testimony Regarding Mr. DeMocker's Bike Ride Requires Remand</u>.

When recounting Mr. DeMocker's alibi, Detective Brown testified that he went to find the location of Mr. DeMocker's bike ride on July 3rd. (GJ 72:18-21). He then testified "[w]e tracked that area and found no bicycle tracks or no fresh tracks on that road." (GJ 73:3-4). Later, Detective Brown acknowledged that he was not on the correct trail. (GJ 73:9-10). His earlier testimony about the absence of tracks was irrelevant and prejudicial because he was on the wrong trail. The *Trebus* letter requested that the State tell the grand jury that it was not until July 6 and then later on July 13th that detectives seriously attempted to locate the bike trail that Mr. DeMocker was riding on at the time of the murder. The State ignored this request. The State did not tell the grand jury when it finally returned to try to locate the correct trail and that it

was too late by then for any tracks to be located. This presentation of the evidence was not a fair and impartial one. *See Crimmins*, 137 Ariz. at 41, 668 P.2d at 884.

Mr. Ainley asked Detective Brown how long it took him to walk the trail "that Mr. DeMocker said that he – it took him four and half hours to cover" and Detective Brown responded in "an hour and 26 minutes." (GJ 73:17-22). This question, which the State knew contained false information, was highly prejudicial in that it called Mr. DeMocker's alibi and credibility into question. Mr. Ainley knew that Mr. DeMocker did not say the ride that night took him four and a half hours. (Bates No. 1816-1817). Detective Brown knew that as well. In fact, they both knew that Mr. DeMocker said he was on the trail for two and a half to three hours. (*Id.*) In spite of that, they both left the jury with the impression that Mr. DeMocker said it took him over two times longer to ride and hike than it took Brown to walk the trail. Brown also failed to tell the grand jury that his walk did not cover the entire length of the trail that Mr. DeMocker took – again making his testimony incomplete and misleading in violation of Rule 12.9. The false testimony was not corrected and resulted in a denial of Mr. DeMocker's right to due process. A remand for a new determination of probable cause is therefore required. *Nelson*, 137 Ariz. at 276, 660 P.2d at 1353; *see also Maretick*, 204 Ariz. at 198, 62 P.3d at 124.

5. <u>False and Misleading Testimony Regarding Jana Johnson Requires Remand</u>.

Detective McDormett gave inaccurate, misleading and prejudicial testimony about witness Jana Johnson's account in September of a bike rider she said she saw on July 2.[9]

[9] The State also did not tell the grand jury that this interview took place on September 30, 2008, nearly two months after she claims to have seen this rider.

A recording of that interview reveals that Ms. Johnson described a younger person, a boy; with light brown hair; wearing long dark pants and dark button-down shirt; riding a regular boys navy blue or black bike with a straight bar frame. None of those descriptions fit either Mr. DeMocker or his bike. Attached hereto as Exhibit B is a color photo of Mr. DeMocker's bike taken by the police. Ms. Johnson also described that the rider was wearing a backpack, which has never been located or seized.

Detective McDermott correctly testified that Mr. DeMocker's bike is orange and white. (GJ 105:9-10). But, Detective McDormett testified that "Ms. Johnson did not provide investigators a color for the bike she saw; only that she thought it was "darker in color." (GJ 105:5-11). What Ms. Johnson actually said in a recorded police interview was that she thought the bike was "navy blue or something." (Disk 66 at 15:10). When the interviewer then asked Ms. Johnson "could you have meant just a darker color or ...?" she responded that it could have been, "it could have been black or ... a darker anything ..." (*Id.*) The grand jury asked again about Ms. Johnson's recollection of the bike color and were told "she couldn't give us a specific color or colors." (GJ 107:3-6).

Detective McDormett also incorrectly told the grand jury that Ms Johnson said she saw a man on a "mountain bike" (GJ 104:1, 105:13). What Ms. Johnson actually said was that she saw someone riding a "normal boy's bike," "more of a dirt bike," "a run-down bike" (Disk 66 at 15:00 and 17:48), "with a straight-across bar frame." (*Id.* at 18:58). None of these descriptions match Mr. DeMocker's bike and none of them were provided to the grand jury. Detective McDormett also inaccurately summarized Ms. Johnson's description of the rider as a "male in darker colored clothing." (GJ 103: 25). Ms. Johnson described the rider in her interview variously as "a younger person" and said "it looked like a boy to me." (Disk 66 at 20:42). Of course, the State knew Mr. DeMocker was 54 years old with silver hair on that date. While Detective McDormett correctly testified that Ms. Johnson mentioned the rider was wearing "darker clothing,"

he left out that Ms. Johnson also said she believes the rider was wearing long pants and a button-down shirt. (Disk 66 at 20:42). Neither the color nor style matches any of the clothing seized by deputies from Mr. DeMocker.

The *Trebus* letter requested that if the grand jury was going to be told about Ms. Johnson that it also be told that she did not say she saw a golf club. The State did not provide this information to the grand jury. Lastly, Detective McDormett was asked if Ms. Johnson's sighting was about an hour and a half before the "oh, no comment" on the phone. (GJ 108:14-16). He responded "[y]es, 7:59 I believe was the oh, no comment, and the woman's original recollection of when she saw the bike was 1:00 and 6:30, 1:00 p.m. and 6:30." He later says she thought it was closer to 6:30 but can't be sure. (GJ 108:17-21). During the interview, Ms Johnson first thought she saw the bike between 2:00 p.m. and 5:00 p.m. and only after being asked to give the broadest time frame it could have been, did she say between 1:00 p.m. and 6:30 p.m. Detective McDormett introduced Ms. Johnson's testimony by saying that "she had mentioned about something that she had seen the *night* of July 2nd..." and adding that "[s]he stated that on the *night* of July 2nd ... ." (GJ 103:4 and 103:22-23 (emphasis added)). That, coupled with Detective McDormett's testimony about the later time was clearly used to suggest that Ms. Johnson saw Mr. DeMocker riding his bike near the victim's home an hour and a half hour before Ms. Kennedy's call was interrupted. This necessarily resulted in a denial of substantial due process and requires a remand for a new determination of probable cause. *Nelson*, 137 Ariz. at 277, 660 P.2d at 1354; *see also Maretick*, 204 Ariz. at 198, 62 P.3d at 124.

6. Remand is Required Because of False and Misleading Testimony about Mr. DeMocker's Computer

The *Trebus* letter requested that the grand jury be told that exculpatory evidence may have been altered or deleted by law enforcement when Mr. DeMocker's laptop was

activated five days after it was seized. Ignoring this request, Detective Page testified to the grand jury that "[w]hat I have been able to determine is that none of the files in my documents folder, that's the folder where we keep all other documents, whatever we work on the computer, none of those files were affected or touched on July 8th." (GJ 129:3-7). This testimony is pure speculation and not based in fact. There is no reason that documents would necessarily be saved in the "my documents" folder, that is based on a user's preference. Most importantly, the grand jury was not told, as requested, that exculpatory files may have been overwritten by computer activity on July 8, after the computer was taken by the police. This denied Mr. DeMocker his right to a fair and impartial presentation of the evidence to the grand jury.

7. Remand is Required Because Unsupported Theories Were Presented to the Grand Jury as Fact.

The grand jury testimony contains instances of rank speculation having no basis in fact or evidence, and often in direct contradiction to the available evidence. The Remand Order noted that this "colored the presentation" to the first grand jury. (Remand Order at page 4). Much of this testimony was specifically elicited by Mr. Ainley. A sampling of the speculation presented as fact is as follows:

1. On showing the grand jury a photo of the victim with a golf club shaft lain against her right arm Mr. Ainley asked Detective Brown "[t]his indentation that you see on her arm right here, if you take this club and rotate it up, does it fit into this indentation?" Detective Brown took the invitation, and speculated without foundation that "[i]t appears to fit with the markings." (GJ 6812-15);
2. Mr. Ainley asked Mr. Echols, "[w]hat happens if the IRS starts taking a look at this?" He responded by asserting that the IRS is "not going to be happy. I think that's an understatement, but they were not going to be happy" if they looked at Mr. DeMocker's financial practices. (GJ 146:21-25);

3. Mr. Echols further speculated when asked by Mr. Ainley "what happens if there is hanky-panky with his finances?" He responded that if Mr. DeMocker was guilty of what Ms. Kennedy was supposedly alleging, "he would lose his license with [sic] or an ability to work for UBS or anyone else, and ... then he would lose everything, his book of value (sic), his ability to be in that business at all, and with assets only being a car, he would be in serious trouble." (GJ 147:4-148:2);
4. Mr. Ainley asked Detective Brown to speculate about blood spatter, asking if it is "[f]air to say the ladder would have had to have been brought in later?" Detective Brown responded "[i]n that position later, yes." (GJ 25:17-19). This is after Detective Brown advised the grand jury that the ladder "should have had blood if the events happened in that way with the ladder being during that and not afterwards." (GJ 25:7-16). This testimony is pure speculation on Detective Brown's part, presented by the State as conclusive evidence of scene staging.
5. When asked by a grand juror about Jim Knapp's demeanor at the scene, Detective Brown testified that "he had called Carol's cellphone ... leaving the message was, Carol, the officers are here because your mom called ... Let me know everything is okay." He then concluded "[s]o he didn't know what was going on initially." (GJ 77:1-9). Detective Brown did not likewise tell the grand jury that Mr. DeMocker had left similar messages for Carol after receiving a call from her brother. Furthermore, he certainly did not tell the grand jury that Mr. DeMocker's similar messages led Detective Brown to conclude, as he apparently did with Mr. Knapp, that such messages were somehow proof that Mr. DeMocker did not know what was going on.

All of this testimony is the same sort of rank speculation, often piled on top of other speculation that this Court found improper in the Remand Order, and was meant

only to prejudice the grand jury. Such conduct is a clear violation of the State's duty to present an unbiased and impartial presentation of the evidence to the grand jury. Remand is required.

CONCLUSION

The State has again failed to present information to the grand jury in a fair and impartial manner, even after receiving clear and unambiguous guidance from this Court. Instead, the State's presentation to the second grand jury, while correcting some of the problems previously identified by the Court, persisted in omitting clearly exculpatory evidence and using speculation, opinion and false and misleading testimony in place of actual evidence.. By repeatedly insisting that "inconclusive" DNA testing results mean that Mr. DeMocker's DNA may have been found at the scene when, in fact, all of the actual DNA, blood and fingerprint evidence points away from Mr. DeMocker and toward one or more other possible perpetrators, the State has again misused the grand jury system in a way that denied Mr. DeMocker's substantial procedural rights under the Criminal Rules and Arizona and U.S. Constitutions. .The State did not take the opportunity to fairly and impartially present all of the clearly exculpatory evidence in its possession as required by law, and instead chose to present the same collection of unfounded and unsubstantiated stories, improper opinion and speculation, all spun in a different but equally prejudicial way.

For these reasons Mr. DeMocker respectfully requests that the Court remand this case to the grand jury.

DATED this 24th day of March, 2009.

By: _____

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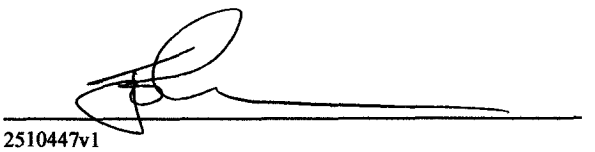

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The New York Times

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February 5, 2009

Science Found Wanting in Nation's Crime Labs

By SOLOMON MOORE

Forensic evidence that has helped convict thousands of defendants for nearly a century is often the product of shoddy scientific practices that should be upgraded and standardized, according to accounts of a draft report by the nation's pre-eminent scientific research group.

The report by the National Academy of Sciences is to be released this month. People who have seen it say it is a sweeping critique of many forensic methods that the police and prosecutors rely on, including fingerprinting, firearms identification and analysis of bite marks, blood spatter, hair and handwriting.

The report says such analyses are often handled by poorly trained technicians who then exaggerate the accuracy of their methods in court. It concludes that Congress should create a federal agency to guarantee the independence of the field, which has been dominated by law enforcement agencies, say forensic professionals, scholars and scientists who have seen review copies of the study. Early reviewers said the report was still subject to change.

The result of a two-year review, the report follows a series of widely publicized crime laboratory failures, including the case of Brandon Mayfield, a lawyer from Portland, Ore., and Muslim convert who was wrongly arrested in the 2004 terrorist train bombing in Madrid that killed 191 people and wounded 2,000.

American examiners matched Mr. Mayfield's fingerprint to those found at the scene, although Spanish authorities eventually convinced the Federal Bureau of Investigation that its fingerprint identification methods were faulty. Mr. Mayfield was released, and the federal government settled with him for $2 million.

In 2005, Congress asked the National Academy to assess the state of the forensic techniques used in court proceedings. The report's findings are not binding, but they are expected to be highly influential.

"This is not a judicial ruling; it is not a law," said Michael J. Saks, a psychology and law

professor at Arizona State University who presented fundamental weaknesses in forensic evidence to the academy. "But it will be used by others who will make law or will argue cases."

Legal experts expect that the report will give ammunition to defense lawyers seeking to discredit forensic procedures and expert witnesses in court. Lawyers could also use the findings in their attempts to overturn convictions based on spurious evidence. Judges are likely to use the findings to raise the bar for admissibility of certain types of forensic evidence and to rein in exaggerated expert testimony.

The report may also drive federal legislation if Congress adopts its recommendations. Senator Richard C. Shelby, Republican of Alabama, who has pushed for forensic reform, said, "My hope is that this report will provide an objective and unbiased perspective of the critical needs of our crime labs."

Forensics, which developed within law enforcement institutions — and have been mythologized on television shows from "Quincy, M.E." to "CSI: Miami" — suffers from a lack of independence, the report found.

The report's most controversial recommendation is the establishment of a federal agency to finance research and training and promote universal standards in forensic science, a discipline that spans anthropology, biology, chemistry, physics, medicine and law. The report also calls for tougher regulation of crime laboratories.

In an effort to mitigate law enforcement opposition to the report, which has already delayed its publication, the draft focuses on scientific shortcomings and policy changes that could improve forensics. It is largely silent on strictly legal issues to avoid overstepping its bounds.

Perhaps the most powerful example of the National Academy's prior influence on forensic science was a 2004 report discrediting the F.B.I. technique of matching the chemical signatures of lead in bullets at a crime scene to similar bullets possessed by a suspect. As a result, the agency had to notify hundreds of people who potentially had been wrongfully convicted.

In its current draft report, the National Academy wrote that the field suffered from a reliance on outmoded and untested theories by analysts who often have no background in science, statistics or other empirical disciplines.

Although it is not subject to significant criticism in the report, the advent of DNA profiling clearly set the agenda. DNA evidence is presented in less than 10 percent of all violent crimes but has revolutionized the entire science of forensics. While DNA testing has helped to free more than 200 wrongfully convicted people, "DNA was a shock to police culture and created an alternative scientific model, which promoted standardization, transparency and a higher level

of precision," said Paul Giannelli, a forensic science expert at Case Western Reserve University School of Law who presented his research to the National Academy. Enforcement officials, Mr. Giannelli said, "chose to say they never make mistakes, but they have little scientific support, and this report could blow them out of the water."

Peter J. Neufeld, a co-director of the Innocence Project, a nonprofit group that uses DNA evidence to exonerate the wrongfully convicted, presented to the academy a study of trial transcripts of 137 convictions that were overturned by DNA evidence and found that 60 percent included false or misleading statements regarding blood, hair, bite mark, shoe print, soil, fiber and fingerprint analyses.

The courts have long struggled with the proper role of scientific evidence. In a 1993 landmark decision, Daubert v. Merrell Dow Pharmaceuticals, the Supreme Court held that scientific testimony had to meet an objective standard. Federal courts have occasionally excluded evidence like handwriting and hair analysis.

Donald Kennedy, a Stanford scientist who helped select the report's authors, said federal law enforcement agencies resented "intervention" of mainstream science — especially the National Academy — in the courts.

He said the National Institute of Justice, a research arm of the Justice Department, tried to derail the forensic study by refusing to finance it and demanding to review the findings before publication. A bipartisan vote in Congress in 2005 broke the impasse with a $1.5 million appropriation.

Mr. Shelby also accused the National Institute of Justice of trying to infiltrate the forensic study panel with lobbyists for private DNA analysis companies, who were seeking to limit the research to DNA studies.

The National Institute of Justice said it would not comment until the report was released. But a preview of potential turf wars played out in the presentations to the National Academy in December 2007. A forensic expert from the Secret Service blasted the F.B.I. for developing questionable techniques "on an ad-hoc basis, without proper research."

He said the Secret Service wanted the National Academy "to send a message to the entire forensic science community that this type of method development is not acceptable practice."

Everyone interviewed for this article agreed that the report would be a force of change in the forensics field.

One person who has reviewed the draft and who asked not to be identified because of promises

to keep the contents confidential said: "I'm sure that every defense attorney in the country is waiting for this report to come out. There are going to be challenges to fingerprints and firearms evidence and the general lack of empirical grounding. It's going to be big."

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Los Angeles Times

http://www.latimes.com/news/science/la-na-crime-science19-2009feb19,0,1813276.story
From the Los Angeles Times

Report questions science, reliability of crime lab evidence

The National Academy of Sciences says many courtroom claims about fingerprints, bite marks and other evidence lack scientific verification. It finds forensics inconsistent and in disarray nationwide.

By Jason Felch and Maura Dolan

February 19, 2009

Sweeping claims made in courtrooms about fingerprints, ballistics, bite marks and other forensic evidence often have little or no basis in science, according to a landmark report released Wednesday by the nation's leading science body.

The National Academy of Sciences report called for a wholesale overhaul of the crime lab system, which has become increasingly crucial to American jurisprudence.

Many experts said the report could have a broad impact on crime labs and the courts, ushering in changes at least as significant as those generated by the advent of DNA evidence two decades ago. But the substantial reforms would require years of planning and major federal funding.

In the meantime, the findings are expected to unleash a flood of new legal challenges by defense attorneys.

"This is a major turning point in the history of forensic science in America," said Barry Scheck, co-founder of the Innocence Project, an organization dedicated to exonerating the wrongfully convicted. He said the findings would immediately lead to court challenges.

"If this report does not result in real change, when will it ever happen?" Scheck asked.

The Los Angeles County Public Defender's office plans to use the National Academy report to file challenges on the admissibility of fingerprint evidence and is reviewing cases in which fingerprints played a primary role in convictions, officials said.

Separately, the Los Angeles Police Department has been reviewing 1,000 fingerprint cases after discovering that two people were wrongfully accused because of faulty fingerprint analyses.

The academy, the preeminent science advisor to the federal government, found a system in disarray: labs that are underfunded and beholden to law enforcement and that lack independent oversight and consistent standards.

The report concludes that the deficiencies pose "a continuing and serious threat to the quality and credibility of forensic science practice," imperiling efforts to protect society from criminals and shield innocent people from convictions.

With the notable exception of DNA evidence, the report says that many forensic methods have never been shown to consistently and reliably connect crime scene evidence to specific people or sources.

"The simple reality is that the interpretation of forensic evidence is not always based on scientific studies to determine its validity," the report says.

For example, frequent claims that fingerprint analysis had a zero error rate are "not scientifically plausible," the report said. The scientific basis for bite mark evidence is called "insufficient to conclude that bite mark comparisons can result in a conclusive match."

Recent cases of CSI gone awry have underscored the report's urgency. In the cases of the 232 people exonerated by DNA evidence, more than half involved faulty or invalidated forensic science, according to the Innocence Project.

Margaret Berger, a professor at Brooklyn Law School and a member of the panel, explained: "We're not saying all these disciplines are useless. We're saying there is a lot of work that needs to be done."

Said U.S. Court of Appeals Judge Harry Edwards, co-chairman of the panel: "There are a lot of people who are concerned, and they should be concerned. Forensic science is the handmaiden of the legal system. . . . If you claim to be science, you ought to put yourself to the test."

Although the panel's recommendations are not binding, they are expected to be influential. Among the recommendations:

* Create a new federal agency, the National Institute of Forensic Science, to fund scientific research and disseminate basic standards.

* Make crime labs independent of law enforcement. Most crime labs are run by police agencies, which can lead to bias, a growing body of research shows.

* Require that expert witnesses and forensic analysts be certified by the new agency, and that labs be accredited.

* Fund research into the scientific basis for claims routinely made in court, as well as studies of the accuracy and reliability of forensic techniques.

Those recommendations have been cautiously embraced by leading associations of forensic scientists, which in 2005 helped convince Congress that the study was necessary.

"You can't continue to do business in 2009 the way you did in 1915," said Joseph Polski of the International Assn. for Identification, whose members include examiners of fingerprints, documents, footwear and tire tracks. "We knew there would be things in there we'd like and things we didn't like."

Many forensic scientists were hesitant to criticize the report for fear of seeming resistant to testing and scrutiny. But there were some delicate complaints.

"It's not the science of forensic science that is in need of repair, I think; it's how the results are interpreted in the courtroom," said Dean Gialamis, head of the American Society of Crime Lab Directors, who was quick to add that his group welcomed the recommendations.

The report was hailed by many defense attorneys, scientists and law professors, who for years have been raising scientific and legal challenges.

"The courts were highly skeptical of experts and resistant to hearing their arguments," said Simon A. Cole, a professor of criminology at UC Irvine who has often testified for defense teams about the limitations of fingerprint evidence. "I feel like I'm Alice coming out of the rabbit hole and back into a world of sanity and reason."

The report had harsh words for the FBI Laboratory and the National Institute of Justice, the research arm of the Justice Department, which have shown little enthusiasm for exploring the shortcomings of forensic science.

"Neither agency has recognized, let alone articulated, a need for change," the report states, adding that they could be subject to pro-prosecution biases.

Atty. Gen. Eric H. Holder Jr. signaled in comments to reporters shortly before the report was released that he would take its concerns seriously: "I think we need to devote a lot of attention and a lot of resources to that problem."

Prosecutors on the front lines, however, were more skeptical. "I know the defense is probably starting bonfires, but this should not in any way shake up anyone's confidence in forensics," said Paula Wulff, manager and senior attorney of the DNA Forensic Program of the National District Attorneys Assn.

She called the recommendations a "Cadillac of aspirations," and expressed doubt that they would be followed given the poor state of the economy.

All sides, however, agreed that the report signals an aggressive reentry of scientists into issues that for decades have fallen to lawyers, judges and juries to resolve.

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Steve Mills of the Chicago Tribune contributed to this report.

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